



**PUBLIC HEARING
BEFORE THE GALLATIN COUNTY / BOZEMAN AREA
BOARD OF ADJUSTMENT**

**JASON MARTEL APPEAL OF SEPTEMBER
15, 2008 COMPLIANCE DECISION THAT A
SPORT COURT IS A STRUCTURE**

FINDINGS, CONCLUSION AND ORDER

SUMMARY OF PROCEEDINGS

This matter comes before the Gallatin County / Bozeman Area Board of Adjustment (BOA) on December 16, 2008 as an appeal from the September 15, 2008 decision of the Gallatin County Code Compliance Specialist that Mr. Martel's sport court is a "Structure" as defined by the Gallatin County / Bozeman Area (GC/BA) Zoning Regulations, is subject to setback requirements, and requires a land use permit.

Pursuant to MCA Section 76-2-223(a) and Section 56.030 of the Gallatin County / Bozeman Area Zoning Regulations, the purpose of this appeal hearing was to determine if the September 15, 2008 decision by the Gallatin County Code Compliance Specialist was made in error, and to affirm, modify, or reverse the decision.

Pursuant to Section 56 of the Gallatin County/ Bozeman Area Zoning Regulations – which were adopted on July 27, 1999 – and after legal notice, a public hearing was held before the BOA in Bozeman, MT on December 16, 2008. Notice of the public hearing was published in the Bozeman Daily Chronicle on November 30, 2008 and December 14, 2008, posted on the premises and one other location, and sent to adjacent property owners via certified mail.

APPLICABLE REGULATIONS

1. The Gallatin County / Bozeman Area (GC/BA) Zoning Regulations were adopted on July 27, 1999 and subsequently amended. They include the following provisions:
2. **Section 62.030 Permit Requirements.** "No building or other structure shall be erected, moved, added to, or structurally altered and no land use shall be changed without valid permits." Section 62.030(E) further provides that a Land Use Permit (LUP) shall be obtained from the Gallatin County Planning Department.

3. **Section 4.1550, definition of a Structure:** “Anything constructed or erected which requires location on the ground.”
4. **Section 4.220, definition of a Building:** “Any structure having enclosed space and a roof for the housing and/or enclosure of persons, animals or chattels, except mobile homes, recreational vehicle and mobile offices.”
5. **Section 14.020(C) Permitted accessory uses in the R-1 District:** Include other buildings and structures typically accessory to residential uses, and private or jointly owned community center recreational facilities, pools, tennis courts, and spas.
6. **Section 14.050 Yards.** Every lot in the R-1 District shall have a 25-foot front and rear yard setback and 12-foot side yard setbacks.
7. **Section 50.030(A). Only uses specifically identified by this title to be built.** “No building, or structure or part thereof shall be altered, enlarged for a use, nor shall any existing building, structure, or part thereof, or land, be used for a purpose or in a manner that is not in conformity with the uses listed as permitted uses for the zone in which such buildings, structure, or land is situated.”
8. **Section 50.035 (A)(1). Glare and Lighting.** Light shall be directed down and/or away from any adjoining residential district, and shall not detract from driver visibility on adjacent streets. In addition, all lighting (except for security purposes) shall be turned off between eleven p.m. and six a.m. (11pm-6am).
9. **Section 50.060(D) Watercourse Setbacks.** Requires a 35-foot setback from structures to the mean high water mark and also requires a 5-foot vegetative buffer.
10. **Section 50.070 Fences, walls and hedges.** Fences may be constructed on the lot line or within the setback provided they do not exceed eight feet in height (4 feet in any corner side yard or front yard).
11. Pursuant to MCA Section 76-2-223(a) and Section 56.030 of the GC/BA Zoning Regulations, the BOA shall hear and decide appeals where it is alleged there is an error made by an administrative official, and it is the BOA’s duty to reverse or affirm, wholly or partly, or modify the June 10, 2008 decision by the Code Compliance Specialist. Pursuant to MCA Section 76-2-224, the concurring vote of three members of the BOA is necessary to reverse the June 10, 2008 decision.

TESTIMONY

12. Loren Martel testified that the sports court provides a fun, safe place that is alcohol and drug free for high school students to play hockey and otherwise recreate.
13. Jason Martel testified that the Code Compliance Specialist's decision should be reversed.
 - A. The zoning jurisdiction (City v County) and classification of his back lot is confusing, he spoke to someone in the County Planning Department about his plans for a sports court prior to construction and was not advised that a permit would be required, the definition of "Structure" was not on Gallatin County's web page until recently, and he thought the City's (smaller) setbacks applied to the County lot after he filed the deed restriction restricting the sale of the county lot. Mr. Martel further testified that the Planning Department's land use permit (LUP) application is misleading because it requests information pertaining to buildings (such as building height and roof pitch), and it was not obvious that his sport court was regulated.
 - B. If the definition of "structure" is literally interpreted, then raised flower beds, tetherball poles, yard lights, clotheslines, etc. would all require land use permits. **Exhibit I.** Definitions of "structure" in other zoning districts suggest that a structure has to be built up off the ground. The Big Sky Zoning Regulations excludes paved areas. The walls on his hockey rink are detachable.
14. Dori Refling, on behalf of Jason Martel, presented additional arguments for why the Code Compliance Specialist was in error, and why the decision should be reversed.
 - A. In her October 13, 2008 appeal, Ms. Refling asserts the Martels may use their property for recreational purposes, and that the sports court is not a "Structure."
 - B. Consistent with a Montana Supreme Court decision in Yurczyk v. Yellowstone County et. al., 2004 MT 3, 319 Mont. 169, 83 P. 3d 266, the application of setbacks to Mr. Martel's slab serves no legitimate purpose to promote public health, safety, morals, and welfare. The Martels may recreate in the setback areas.
 - C. The Martel's private property rights are clashing with the police power of a zoning regulation. Under the Equal Protection argument, zoning must be applied equally. Gallatin County has nine other definitions of "structure," that refer to built up. People living in Big Sky, the City of Bozeman, or Springhill could have this slab. People in the Bozeman "donut" are not being treated equally.

- D. MCA 76-2-202(3) provides that zoning regulations must, as nearly as possible, be made compatible with the zoning ordinance of the municipality within the jurisdictional area. The Gallatin County “Donut” zoning regulations are not compatible with the City of Bozeman’s zoning ordinance, which has different setbacks for R-1 zoning. Ms. Refling questioned the validity of the 12-foot county setbacks for R-1 zoning because the City’s setbacks are only 6 feet.
- E. Consistent with a Montana Supreme Court decision in *Francis and Anita Yurczyk versus Yellowstone County et. al.* (2004), the definition of “structure” is vague, therefore the regulation is void for vagueness, or void because it is overly broad, and the decision should be reversed.
15. Don Kreitz (2001 Fairway Dr), Dick McConnen (2007 Spring Creek Dr), and Mary Lou Countryman (2017 Fairway Dr.) testified in support of a decision to affirm the Code Compliance Specialist.
16. Robert (Bob) Lee (2101 Fairway Dr) testified in support of a decision to affirm the Code Compliance Specialist. He further testified that he has been a Land Use Planner for 30 years, that the definition of “structure” in the Gallatin County /Bozeman Area Zoning Regulations is clear, and that the City of Bozeman’s Unified Development Ordinance has the same definition (**Lee Exhibit**).
17. Tom Stonecipher stated that he represents Clara and Seth Pincus (2010 Spring Creek Drive), the 24 individuals listed on **Exhibit J**, and Charmaine McConnen, and testified in support of a decision to affirm the Code Compliance Specialist.
- A. With regards to the void for vagueness argument, Mr. Stonecipher stated that he did not hear any testimony that there was a reliance on a vague ordinance. Nobody read the ordinance before construction was underway. A vagueness argument is a reliance argument and we do not have a reliance interest here. The void for vagueness argument should be set aside.
- B. Utilizing a “reductio argument,” Mr. Stonecipher stated that this “thing” is a rink, not landscaping, ground cover, a patio, or a terrace. It is a 6000 sq. ft. slab of concrete poured on the ground. There should be no confusion over what the language means, or the application of the word “structure” to this “thing.” If we were arguing over a tetherball pole we would have a different argument.

- C. Concepts of public health safety and welfare cannot be applied it in any meaningful way in interpreting zoning ordinances to a private place. Arguments for advancement of public safety do not fit.
 - D. Zoning ordinances for Springhill, Big Sky, or the City of Bozeman do not have to encompass the same concepts and land use restrictions as the Gallatin County / Bozeman Area (Bozeman Donut) Zoning Regulations.
18. In appellant rebuttal, Ms. Refling, representing Jason Martel testified that the MT Supreme Court case Yurczyk v. Yellowstone County et. al., 2004 MT 3, 319 Mont. 169, 83 P. 3d 266 is controlling. There is no evidence showing how the setbacks would enhance health, safety, welfare, or that property values of adjacent property have been reduced. There is clear conflict over the county's interpretation of "structure." The Martel's substantive due process and equal protection rights have been violated. Yes, there can be difference in local zoning regulations, as long as the right to equal protection is not violated. The Regulation is void because it is overly broad or void because it is overly vague.
19. Jim Greenbaum, Deputy County Attorney, advised the BOA that this is a hearing to evaluate the Code Compliance Specialist's decision, and that the Zoning Regulation is presumptively valid. This is not the hearing to challenge the constitutionality of the Zoning Regulation.

FINDINGS OF FACT

20. The subject property, Lot 5A, Parcel II, is owned by Jason and Shelley Martel and is located in the R-1 District of the Gallatin County / Bozeman Area Zoning District. It is one of several county parcels surrounded by the City of Bozeman, and is adjacent to the Martel's parcel in the Bozeman city limits.
21. The sport court is a "private recreational facility" which is a permitted accessory use in the R-1 District (Section 14.020(C)). The recreational use of the property is not an issue.
22. The sport complex includes a concrete sport court measuring 60'10" wide by 100'6" long (approximately 6000 sq. ft.) that is surrounded in part by solid walls approximately three feet high. The court is further surrounded on three sides by an eight foot fence erected on the property line, and also has four large light posts.
23. The sport court was constructed of reinforced concrete and so constructed/located on the ground. It has an impenetrable and impermeable surface of a permanent nature.

24. The sport court encroaches approximately 7 feet into the side yard setbacks (north and south property lines), 20 feet into the rear yard setback (east property line), and 4 feet into the watercourse setback (west side of sport court towards the interior of the lot).
25. The GC/BA Zoning Regulations define a Structure as, “Anything constructed or erected which requires location on the ground.” The regulation is presumptively valid.

CONCLUSIONS

26. After considering all testimony, evidence, exhibits, and arguments, and in board discussion, the Gallatin County / Bozeman Area Board of Adjustment (BOA) concludes:
 - A. To adopt and incorporate the Code Compliance Specialist’s staff report into these Findings and Conclusions.
 - B. The county’s definition of “structure” is clear and straight forward, not vague. There are no semantic issues. The City of Bozeman’s definition of “structure” is the same as the county’s.
 - C. Other definitions of structure, including Black’s Law Dictionary and engineering definitions support a decision that this “thing” is not anything other than a “structure.”
 - D. This “thing” is there for a specific purpose, and is not going any place. It meets every definition of a structure. Since it is a structure, then setbacks apply.
 - E. The sport court does not meet the City of Bozeman’s required setbacks either.
 - F. Mr. Martel acted only in his family’s best interest, not out of maliciousness or out of any scheme to destroy another person’s property rights or values, but maybe did not do all the due diligence that could have been done to determine setbacks and how big the rink could be.
 - G. A motion was made by Member Amsden, and seconded by Member East to affirm the Code Compliance Specialist’s September 15, 2008 decision that the sport court is a structure, is subject to setbacks, and requires a land use permit. The motion passed unanimously.

DETERMINATION AND ORDER

The foregoing decision and order is based on the circumstances and facts herein. The BOA having made and adopted the above findings of fact and conclusions as a part of this determination, and after due deliberation and consideration of all the facts, circumstances, rules, laws and regulations, and after carefully considering the testimony, documents, exhibits, and submissions in this case enters a determination that the Code Compliance Specialist was not in error and the September 15, 2008 decision is hereby AFFIRMED.

Gallatin County Consolidated Board of Adjustment

Jason Armstrong, Chairman

Date